88- 1796

No.

Supreme Court, U.S.
FILED
MAY 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

BARTLETT VOUGHT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ
Solicitor General, State of Illinois
TERENCE M. MADSEN
MARCIA L. FRIEDL *
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2127

Counsel for Petitioner

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 34450--55--5-2-89)

QUESTIONS PRESENTED

1. Whether evidence must be suppressed merely because it is secured in a governmental search conducted pursuant to a mistaken though reasonable belief in facts establishing valid consent?

2. Whether a governmental search can remain within the scope of a prior private search as contemplated by *United States v. Jacobsen* where, though the searches involved entry into a suspect's home, no additional fourth amendment interests of the suspect could conceivably have been compromised by the official intrusion?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT:	
I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE JURISDICTIONS AND CORRECT THE RULING BELOW THAT EVIDENCE MUST BE SUPPRESSED MERELY BECAUSE IT IS SECURED IN A GOVERNMENTAL SEARCH CONDUCTED PURSUANT TO A MISTAKEN THOUGH REASONABLE BELIEF IN FACTS ESTABLISHING VALID CONSENT	6
II. CERTIORARI SHOULD BE GRANTED BECAUSE THE HOLDING BELOW CONFLICTS WITH THOSE FOURTH AMENDMENT PRINCIPLES ANNOUNCED BY THIS COURT IN *UNITED STATES V. JACOBSEN*	9
CONCLUSION	10

APPENDIX

	App. Page
Opinion of the Appellate Court of Illinois, Second Judicial District, September 15, 1988	1-13
Order of the Appellate Court of Illinois, Second Judicial District, Denying Petition for Rehearing, October 14, 1988	14
Order of the Supreme Court of Illinois Denying Petition for Leave to Appeal, February 1, 1989	15

TABLE OF AUTHORITIES

Cases	Page
Commonwealth v. Wahlstrom, 375 N.E.2d 706 (Mass. 1978)	6
Flanagan v. State, 440 So.2d 13 (Fla.App. 1st Dist. 1983)	6
Franks v. Delaware, 438 U.S. 166 (1978)	7
Illinois v. Krull, 480 U.S. 340 (1987)	7
Mincey v. Arizona, 437 U.S. 385 (1978)	7
Nix v. State, 621 P.2d 1347 (Alaska 1981)	6
People v. Adams, 53 N.Y.2d 1, 422 N.E. 537, *cert. denied*, 454 U.S. 854 (1981)	8
People v. Gary, 387 N.W.2d 877 (Mich. App. 1986)	6
People v. Jacobs, 43 Cal.3d 472, 729 P.2d 757 (1987) (en banc)	6
People v. Miller, 40 Ill.2d 154, 238 N.E.2d 407, *cert. denied*, 393 U.S. 961 (1968)	6

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) .. 7

Snyder v. State, 738 P.2d 1303 (Nev. 1987) 6

State v. Carsey, 295 Or. 32, 664 P.2d 1085 (1983) 6

State v. Castaneda, 150 Ariz. 382, 724 P.2nd 1 (1986) (en banc) 6

State v. Christian, 26 Wash. App. 542, 613 P.2d 1199, *aff'd.*, 95 Wash.2d 655, 628 P.2d 806 (1981) (en banc) 6

State v. No Heart, 353 N.W.2d 43 (S.D. 1984) .. 6

United States v. Hamilton, 792 F.2d 837 (9th Cir. 1986) 6

United States v. Jacobsen, 466 U.S. 109 (1984) .. 9

United States v. Leon, 468 U.S. 897 (1984) 7

United States v. Matlock, 415 U.S. 164 (1974) ... 6, 7

United States v. Miller, 800 F.2d 129 (7th Cir. 1986) 6

United States v. Peterson, 524 F.2d 167 (4th Cir. 1975) 6

United States v. Zapata-Tomallo, 833 F.2d 25 (2nd Cir. 1987) 6

Constitutional Provision

U.S. Const., Amend. IV 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

BARTLETT VOUGHT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

OPINION BELOW

The opinion of the Appellate Court of Illinois, Second Judicial District, is reported at 174 Ill.App.3d 563, 528 N.E.2d 1095, and reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Appellate Court of Illinois, Second Judicial District, reversing respondent's conviction of December 8, 1986, was entered on September 15, 1988. A

timely Petition for Rehearing was denied by the appellate court October 14, 1988, and a timely Petition for Leave to Appeal was denied by the Illinois Supreme Court February 1, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

STATEMENT OF THE CASE

Respondent was charged in the Circuit Court of the 18th Judicial Circuit, DuPage County, Illinois, with the June 23, 1986, possession of and intent to deliver more than 30 grams of a controlled substance containing cocaine. (C. 7) Prior to trial, respondent filed a motion to suppress cocaine and post-arrest statements, alleging that law enforcement's entry into his motel room June 23 violated the fourth amendment.

At the hearing on respondent's motion, Karen Morlock, General Manager of the Holiday Inn in Itasca, Illinois,

testified that while on duty at 2:45 p.m. June 23, 1986, she was informed of the following by Executive Housekeeper Marina Garcia: After the 1:00 p.m. checkout time that date, maid Anna Olivares intended to clean room 219 because it was due to be a checkout. (C. 73-75) When she discovered a "Do Not Disturb" sign on the door, Olivares informed Garcia, who knocked on the door, received no answer, opened the door, and told Olivares to clean the room because she saw nothing within. (C. 75) While cleaning the room, Olivares discovered an old suitcase and again retrieved Garcia, who opened the suitcase and saw white powder. (C. 76) Motel employee Richard Limukovic then entered the room and observed that the white powder was cocaine (a portion of which authorities later learned he tasted and pocketed). (C. 76-77, 92, 104-05)

Morlock called the Itasca Police after having been immediately informed of the discovery. (C. 77) At 3:00 p.m., Detective Rusty Votava was dispatched to the Holiday Inn to speak to Manager Morlock. (C. 91) She related her conversation with Garcia, and told Votava that the room had been vacated. (C. 88, 92-93, 115) The two then went to the room, where Morlock knocked on the door and opened it with her pass key after receiving no answer. Upon entering the room, Votava looked about for personal belongings and saw no clothing or other personal effects. (C. 95, 110) However, there were a small amount of change, a hotel key, and two pieces of scratch paper left on the television. (C. 95) Votava then walked to the other end of the room and saw a closed but unlocked suitcase which neither he nor Morlock opened. (C. 96-98) As Votava picked up the phone to call for assistance in securing the room, respondent appeared. (C. 98)

Upon respondent's entry, Votava identified himself as a police officer, exhibited his badge, and asked respon-

dent his name and what he was doing in the room. (C. 99-100) Respondent informed that his name was Bart and the room his, but denied knowledge of who might own the suitcase. (C. 100) When respondent was asked if he would mind if Votava opened the suitcase, he said, "No, go ahead. It's not mine." (C. 100) Votava proceeded to open the suitcase and observed four plastic bags, one of which was open and leaking a white powdery substance. (C. 100)

It was stipulated that respondent rented room 219 the nights of June 21 and 22. (C. 71) Olivares noted clothes hanging up in the room during his occupancy. (C. 79) Her Housekeeper's Report, which had been prepared at 2:00 a.m. June 23 by an auditor and received in the housekeeping department by 7:00 a.m., reflected that room 219 was to be a 1:00 p.m. check out. (C. 80-82) However, respondent had in fact paid for an additional night sometime between 7:00 a.m. and 1:00 p.m. June 23 and was a registered guest for that date. (C. 71-72, 82-83) Prior to Votava's entry into room 219, neither he nor any hotel employee checked with the front desk guest registry to ascertain whether that morning respondent had extended his stay. (C. 84)

Based on the evidence elicited, petitioner argued that Officer Votava's conduct was permissible because Manager Morlock had apparent authority to consent to the entry into room 219 and because law enforcement intrusion on privacy interests did not exceed the scope of an already completed private search. Petitioner also argued that, in any event, the exclusionary rule should not be applied because the officer's actions were taken in good faith. (C. 122-26) The trial court held that Officer Votava's entry into an apparently unoccupied motel room was proper and

denied respondent's motion to suppress. (C. 139) Subsequently, respondent was convicted in a stipulated bench trial. (C. 187)

On appeal to the Appellate Court of Illinois, Second Judicial District, petitioner unsuccessfully reiterated the arguments presented below in support of the trial court's refusal to suppress evidence. The appellate court held that Officer Votava's room entry was unreasonable absent Manager Morlock's actual authority to consent, that respondent's consent to search the suitcase, his cocaine, and his post-arrest statements were tainted by the illegal entry, and that a good faith exception to the exclusionary rule could not be applied in the present context. The court further held that Officer Votava's actions could not be validated as having remained within the bounds of the previously conducted private search. Accordingly, the court remanded for a new trial wherein neither the cocaine nor respondent's post-arrest statements could be utilized as evidence. Thereafter, petitioner was denied review by the Illinois Supreme Court of the issues presently raised.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE JURISDICTIONS AND CORRECT THE RULING BELOW THAT EVIDENCE MUST BE SUPPRESSED MERELY BECAUSE IT IS SECURED IN A GOVERNMENTAL SEARCH CONDUCTED PURSUANT TO A MISTAKEN THOUGH REASONABLE BELIEF IN FACTS ESTABLISHING VALID CONSENT.

In *United States v. Matlock*, 415 U.S. 164, 177 n. 14 (1974), this Court left open the question of whether a search is rendered unreasonable under the fourth amendment merely because consent to search was obtained from a third party later determined not to have in fact possessed sufficient control over the premises searched. The holding of the court below, that actual authority is a constitutional prerequisite to consent searches, is erroneous and in conflict with the majority of jurisdictions resolving the issue.[1] Moreover, the court's invocation of the ex-

[1] *See United States v. Miller*, 800 F.2d 129 (7th Cir. 1986); *United States v. Hamilton*, 792 F.2d 837 (9th Cir. 1986); *United States v. Zapata-Tamallo*, 833 F.2d 25 (2nd Cir. 1987); *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975); *State v. Castaneda*, 150 Ariz. 382, 724 P.2nd 1 (1986) (en banc); *Snyder v. State*, 738 P.2d 1303 (Nev. 1987); *Commonwealth v. Wahlstrom*, 375 N.E.2d 706 (Mass. 1978); *Nix v. State*, 621 P.2d 1347 (Alaska 1981); *People v. Jacobs*, 43 Cal.3d 472, 729 P.2d. 757 (1987) (en banc); *State v. No Heart*, 353 N.W.2d 43 (S.D. 1984); *State v. Christian*, 26 Wash. App. 542, 613 P.2d 1199, *aff'd on other grounds*, 95 Wash.2d 655, 628 P.2d 806 (1981) (en banc); *Flanagan v. State*, 440 So.2d 13 (Fla. App. 1st Dist. 1983); *People v. Gary*, 387 N.W.2d 877 (Mich.App. 1986). *But see State v. Carsey*, 295 Or. 32, 664 P.2d 1085 (1983); *People v. Miller*, 40 Ill.2d 154, 238 N.E.2d 407, *cert. denied*, 393 U.S. 961 (1968).

clusionary rule where a search was conducted pursuant to an officer's reasonable though mistaken belief in facts which would establish a third party's authority to consent is inconsistent with this Court's decisions in *United States v. Leon*, 468 U.S. 897 (1984), and *Illinois v. Krull*, 480 U.S. 340 (1987), recognizing good faith exceptions to the judicially-created sanction.

It is well-established that probable cause supporting the issuance of a search warrant may be based on information appropriately accepted by the governmental affiant as true though it is later exposed to be false. *See generally Franks v. Delaware*, 438 U.S. 166 (1978). Similarly, warrantless searches are permissible provided authorities "reasonably believe" an emergency exists. *Mincey v. Arizona*, 437 U.S. 385, 392 (1978). Because law enforcement holds a legitimate and substantial interest in conducting searches pursuant to voluntary consent [*Schneckloth v. Bustamonte*, 412 U.S. 218, 227-29 (1973)], an officer's reasonable reliance on facts which would establish an individual's authority to consent if true should also serve to validate the ensuing search under the fourth amendment. A contrary finding would leave nearly all third party consent searches open to attack since only by employing continued police surveillance could authorities actually know, prior to the search, that a third party holds the power to permit inspection "in his own right" through mutual use of property amounting to "general[ ] . . . joint access or control for most purposes." *United States v. Matlock*, 415 U.S. 164, 171 n. 7 (1974). And where the officer reasonably believes that the consenting party has sole authority to consent, he is not on notice that other privacy interests are even implicated.

Even if this Court were to hold that the fourth amendment will not tolerate searches conducted pursuant to an

officer's mistaken though reasonable belief in facts establishing consent, it would nonetheless be inappropriate to apply the exclusionary rule to evidence thereby secured where information supporting the search was directly supplied by the consenting party. In *Leon* and *Krull*, this Court observed that due to the societal costs in withholding relevant, reliable evidence from the truth seeking process in a criminal trial, the exclusionary rule should be invoked only in circumstances where it provides a significant and additional deterrent to fourth amendment violations. This Court further observed that where officers reasonably rely on statutes or search warrants later determined to be unconstitutional, there exists no police illegality and thus nothing to deter.

Just as officers cannot generally be expected to question the validity of a warrant or statute, they should ordinarily be entitled to rely on the representations of a citizen concerning his own mutual use of or exclusive control of property. Given the legitimacy of and pervasive reliance on consent searches in law enforcement, exclusion of evidence thereby secured will not deter future consent searches if officers have no reason to discredit the consenting party's factual assertions which support his legal authority to consent. *See People v. Adams*, 53 N.Y.2d 1, 422 N.E.2d 537, *cert. denied*, 454 U.S. 854 (1981).

In the present case, Karen Morlock informed Officer Votava that she was the General Manager of the motel and that subsequent to the 1:00 p.m. checkout time, maid Olivares discovered a suitcase reportedly containing cocaine in room 219 which had been vacated. Because there existed no apparent cause to question Morlock's assertion that room 219 was no longer occupied, the officer's reliance on her representations in entering the room was reasonable. Further, though respondent's sudden appearance

might have suggested a mistake had been made, he immediately disclaimed ownership of the suitcase thus independently authorizing its search. Accordingly, the facts and decision below afford this Court the opportunity to resolve a legal conflict among the jurisdictions and to correct error in the exclusion of unquestionably probative evidence.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE HOLDING BELOW CONFLICTS WITH THOSE FOURTH AMENDMENT PRINCIPLES ANNOUNCED BY THIS COURT IN *UNITED STATES V. JACOBSEN.*

In *United States v. Jacobsen*, 466 U.S. 109, 113 (1984), this Court reiterated the well-established principle that the fourth amendment does not protect against unreasonable searches or seizures effected through purely private action. This Court further held that where a governmental search follows a private one, the legality of the governmental intrusion "must be tested by the degree to which [it] exceeded the scope of the private search." *Id.* at 115. In the present case, the inside of respondent's room and suitcase was examined by maid Olivares, Executive Housekeeper Garcia and motel employee Limukovic prior to Officer Votava's involvement. As in *Jacobsen*, the governmental search was conducted pursuant to unsolicited, private invitation and followed "on the heels of" the private search such that there was a "virtual certainty" the contents of the room had not been altered by respondent in the interim. *Id.* at 115, 119. Indeed, until respondent appeared in the room and himself invited Votava to open the suitcase, the officer's potential compromise of any fourth amendment interests was considerably less extensive than that effected by Limukovic, who had actually

viewed, tasted and obsconded with a portion of the cocaine.[2]

Officer Votava did not infringe on any fourth amendment interest not already frustrated by private conduct. Because this circumstance justified his actions independent of any belief that room 219 was unoccupied, the lower court's erroneous refusal to apply *Jacobsen* warrants this Court's review.

CONCLUSION

For all the reasons discussed herein, a writ of *certiorari* should issue to review the decision of the Illinois Appellate Court.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ
Solicitor General, State of Illinois
TERENCE M. MADSEN
MARCIA L. FRIEDL *
Assistant Attorneys General
Counsel for Petitioner

* Counsel of Record

[2] The lower court's refusal to apply *Jacobsen* because the suitcase was purportedly seized from respondent (App. at 5, 6) ignores his immediate disclaimer of ownership. More important, that a container was seized from a suspect holds significance only insofar as it becomes more likely additional privacy or possessory interests exist because the contents have been altered or the item is in current use. Similarly, the lower court's concern that authorities made a warrantless entry into a "home" (App. at 6) would be legitimate only if it were not clear whether respondent had utilized the room subsequent to the private entry.

APPENDIX

No. 2-87-0015—Filed September 15, 1988

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

BARTLETT VOUGHT,
Defendant-Appellant.

Appeal from the Circuit Court of Du Page County.
No. 86 CF 1036
Hon. Edward W. Kowal, *Judge Presiding.*

JUSTICE NASH delivered the opinion of the court:

Defendant, Bartlett Vought, was convicted of the unlawful possession of 30 or more grams of a controlled substance with intent to deliver and was sentenced to a 10-year term of imprisonment and fined $240,000. On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence obtained as a result of a warrantless entry into his hotel room by a police officer. Defendant also contends, and the State concedes, that in the event his conviction is affirmed on appeal, defendant must receive a credit of $915 toward his fine as a result of time spent in custody between his arrest and sentencing. (*People v. Hare* (1988), 119 Ill. 2d 441, 519 N.E.2d 879.) The State asserts that the officer's entry and subsequent search of defendant's room did not violate the fourth amendment because (1) the search did

not exceed the scope of a previous private search by hotel employees; (2) the officer had a good-faith belief that the room was vacant at the time he entered it; (3) the cocaine in the suitcase posed a potential danger to hotel employees; and (4) defendant abandoned any interest in the suitcase in which the contraband was found when he told the officer it did not belong to him. We reverse.

At the hearing on defendant's motion to suppress evidence the parties stipulated that defendant rented room 219 at the Holiday Inn in Itasca from June 21, 1986, through and including June 23, 1986. He arranged and paid for his final day's lodging at some time between 7 a.m. and 1 p.m. on June 23. One of the hotel maids, Anna Olivares, checked room 219 during the morning of June 23 and saw clothes hanging up. As her housekeeping sheet showed that the guest in room 219 was due to check out that day, and the room was still occupied, Olivares decided to clean it after the 1 p.m. check-out time. When Olivares returned to the room after 1 p.m. and saw a "do not disturb" sign on the door, she informed her supervisor, Maria Garcia, who knocked on the door, unlocked it after receiving no answer, and told Olivares to clean the room.

After Olivares began to clean the room she noticed a suitcase beside one of the beds. The suitcase was closed, but was not locked, and Olivares opened it. She noticed a white powdery substance inside the suitcase and called in Garcia. Another hotel employee, Richard Limukovic, also entered the room at this time. Limukovic tasted the substance and stated that he believed it was cocaine. Garcia informed the hotel general manager, Karen Morlock, about the discovery of the suitcase and its contents at about 2:45 p.m.

Morlock called the Itasca police department, and Officer Rusty Votava arrived at the hotel a few minutes later. Morlock informed the officer that a maid had found a suitcase in room 219 which might contain illegal drugs and that the room was unoccupied. Morlock had not checked the hotel's guest registry list at that time to determine

the occupancy status of the room, and her belief that the room was unoccupied was based upon her conversation with Garcia. Officer Votava did not ask Morlock at this time if she had checked the hotel's records with regard to the occupancy status of room 219, nor did he ask her to do so.

Officer Votava and Morlock entered room 219 at approximately 3 p.m., and the "do not disturb" sign was still on the front door. Morlock opened the door with a pass key after knocking and receiving no response. The only personal effects in the room were some change and a hotel key on a television stand, scratch paper on top of the television, and the suitcase. Votava was calling the Itasca police department for assistance in securing the room when the defendant walked into the room. When Votava asked if defendant would mind if he opened the suitcase, defendant stated that he would not mind and that the suitcase did not belong to him. Votava then opened the suitcase, which had been closed but unlocked, and discovered contraband subsequently determine to be 799.1 grams of cocaine. Votava placed defendant under arrest.

The trial court denied defendant's motion to suppress and held a bench trial at which the evidence was received by stipulation. The parties stipulated, among other things, that defendant made certain incriminating statements after his arrest; that at about 3:30 p.m. on June 23, Votava gave defendant *Miranda* warnings at the Itasca police station, which defendant stated that he understood and signed a *Miranda* waiver form. Defendant told Votava that he had flown to Chicago with two other men, one of whom he referred to as Alan and the other as Murphy. Alan carried the suitcase on the plane and took it to the Holiday Inn where it was later moved to defendant's room.

Detective William Simmons of the Metropolitan Enforcement Group and Officer Michael Tellone of the Itasca police department also questioned defendant at about 7:05 p.m. on June 23, 1986. They repeated the *Miranda* warn-

ings, and defendant signed another waiver form. Defendant stated that he received the cocaine from an individual in Florida and that he and two other men agreed to take the cocaine to Chicago by airplane and to deliver it to an individual in the Chicago area. Defendant and the others took a flight to Chicago on June 21, during which the cocaine was taped to their legs. The delivery fell through, and defendant was planning to return to Florida with the cocaine when Officer Votava arrested him.

On June 24, 1986, during the early morning hours, while Officer Votava transferred defendant to the Du Page County jail, defendant apologized for lying to Votava the previous day, stating that the recent attempted drug transaction was his first effort in retailing cocaine and it did not work out.

Defendant renewed the suppression motion at the stipulated bench trial, and it was once again denied. The trial judge found defendant guilty, imposed sentence, and this appeal followed.

It is undisputed by the parties that defendant was a registered guest in room 219 on June 23, 1986. The fourth amendment constraints against unreasonable searches and seizures apply to guests in hotel rooms, just as they apply to tenants in homes and residents of boarding houses. (*Stoner v. California* (1964), 376 U.S. 483, 490, 11 L. Ed. 2d 856, 861, 84 S. Ct. 889, 893.) In *Stoner*, a hotel desk clerk advised police officers that a robbery suspect was staying in the hotel but was not in his room at that time. The officers asked the clerk for permission to enter the suspect's room, and the clerk consented. The court held that the clerk had no authority to consent to the search and stated that the right of hotel guests to be protected from unreasonable searches and seizures "would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel." (*Stoner*, 376 U.S. at 490, 11 L. Ed. 2d at 861, 84 S. Ct. at 893.) Under *Stoner*, a hotel guest receives the same constitutional protection against unreasonable searches and seizures in his room

that an occupant of a more permanent type of residence receives with regard to his house or apartment. *People v. Wilson* (1980), 86 Ill. App. 3d 637, 640, 409 N.E.2d 988.

The State argues, however, that fourth amendment concerns are not implicated in the present case because the cocaine was initially discovered during the course of a private search by hotel employees, and the subsequent search by Officer Votava did not exceed the scope of that private search. The State relies primarily upon *United States v. Jacobsen* (1984), 466 U.S. 109, 80 L. Ed. 2d 85, 104 S. Ct. 1652, in which employees of a private freight company examined the contents of a damaged package in which they found a 10-inch long tube which was covered by crumpled pieces of newspaper. The tube contained four plastic bags, one of which contained a white powdery substance. The employees notified the Drug Enforcement Administration about the package and, before the first DEA agent arrived, put the plastic bags inside the tube which was then returned to the box. The agent retrieved the bag with the powdery substance, field tested a portion of the contents, and learned that the bag contained cocaine. The court held that the actions of the agents did not violate the fourth amendment and stated that "the federal agents did not infringe any constitutionally protected primary interest that had not already been frustrated as a result of private conduct." *Jacobsen*, 466 U.S. at 126, 80 L. Ed. 2d at 102, 104 S. Ct. at 1663.

The State's reliance upon *Jacobsen* is misplaced. The court stated in a footnote to that opinion that the case was distinguishable from one in which the police simply learn from a private individual that there is contraband inside a container, seize the container from its owner, and then conduct a warrantless search. The court stated that under such circumstances the search would be unconstitutional. (*Jacobsen*, 466 U.S. at 120 n.17, 80 L. Ed. 2d at 98 n.17, 104 S. Ct. at 1660 n.17.) In the case at bar, unlike *Jacobsen*, the contraband was seized from the defendant. The United States Supreme Court recognized in *Jacobsen*

that, under such circumstances, the defendant retains a legitimate expectation of privacy with respect to the container, even if a private individual has seen the contraband inside the container. The State's argument must therefore fail.

Another factor which distinguishes the present case from *Jacobsen* is the fact that Officer Votava made a warrantless entry into defendant's hotel room in order to seize the contraband. The *Stoner* holding establishes that hotel guests are entitled to the same fourth amendment protections as occupants of residences of a more permanent nature. (*Stoner v. California* (1964), 376 U.S. 483, 490, 11 L. Ed. 2d 856, 861, 84 S. Ct. 889, 893.) Commenting upon *Jacobsen*, Professor LaFave states, "it is to be doubted that if a private person searched the premises of another and then reported to the police what he had found (instead of removing the evidence and handing it over to the police), that the police could then make a warrantless entry of those premises and seize the named evidence." W. LaFave, *Search and Seizure*, §1.8(b), at 188 (1987).

We agree with Professor LaFave's conclusion. The right of an individual to be free from governmental intrusions into his home lies at the core of the fourth amendment. (*Payton v. New York* (1980), 445 U.S. 573, 589-90, 63 L. Ed. 2d 639, 653, 100 S. Ct. 1371, 1382.) Warrantless entries into residences are *per se* unreasonable unless exigent circumstances are present. (*Payton*, 445 U.S. at 590, 63 L. Ed. 2d at 653, 100 S. Ct. at 1382.) The State's position that, absent exigent circumstances, a police officer may make a warrantless entry into a hotel room or other residence merely because a private individual has seen contraband inside the residence is squarely at odds with *Payton* and would largely eviscerate the warrant requirement of the fourth amendment. We reject the State's contention that Officer Votava's warrantless entry and search were proper because of the prior private search by hotel employees.

The State next contends that the trial court properly refrained from applying the exclusionary rule to suppress the evidence in question because Officer Votava had a reasonable, good-faith belief that defendant's hotel room was vacant and that the general manager of the hotel, Karen Morlock, had authority to consent to the search. It is clear that a hotel manager may validly consent to the search of a vacant room. (*United States v. Akin* (7th Cir. 1977), 562 F.2d 459, 464.) The State asserts that the good-faith doctrine espoused by the United States Supreme Court in *United States v. Leon* (1984), 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405, should be applied here because of Morlock's apparent authority to consent to the entry and search.

In *Leon*, the court concluded that evidence seized by officers reasonably relying upon a warrant issued by a detached and neutral magistrate is admissible even if the warrant is later determined to be invalid. (*Leon*, 468 U.S. at 913, 82 L. Ed. 2d at 692, 104 S. Ct. at 3415.) The court stated that punishing police officers for errors made by magistrates "cannot logically contribute to the deterrence of Fourth Amendment violations." 468 U.S. at 921, 82 L. Ed. 2d at 697, 104 S. Ct. at 3419.

The State argues that the *Leon* doctrine should be extended to situations in which a police officer makes a warrantless entry into a private residence based upon a reasonable, but mistaken, good-faith belief that another person who consented to the entry had the authority to do so. We find no basis to do so and note that in *Leon* the police officer did have a search warrant that had been issued by a neutral and detached magistrate. In *Johnson v. United States* (1948), 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367, Mr. Justice Jackson, writing for the majority, made the following statement concerning the rationale behind the fourth amendment warrant requirement:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences

> which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. * * * When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." (*Johnson*, 333 U.S. at 13-14, 92 L. Ed. at 440, 68 S. Ct. at 369.)

In accord with this policy, as we have previously noted, the United States Supreme Court has held that warrantless entries into private premises by law enforcement officials are *per se* unreasonable unless exigent circumstances are present. *Payton v. New York* (1984), 445 U.S. 573, 590, 63 L. Ed. 2d 639, 653, 100 S. Ct. 1371, 1382.

We consider that *Payton* is consistent with *Leon* where the court noted that the primary purpose of the exclusionary rule is to deter unlawful police conduct and stated that when an officer has relied in good faith upon a search warrant obtained from a judge or magistrate, and has acted within its scope, there is no improper police conduct to deter. (*Leon*, 468 U.S. at 920-21, 82 L. Ed. 2d at 697, 104 S. Ct. at 3419.) The only improper conduct claimed in *Leon* was the decision of the judge to issue a search warrant; by contrast, a decision to make a warrantless entry and search is made by the police themselves. The purpose of the rule set forth in *Payton* is to deter police officers from making such a decision unless exigent circumstances are present, and, unlike the situation in *Leon*, the rule clearly has an effect upon police conduct. We reject the State's argument that the good-faith doctrine in *Leon* is applicable in the context of this

case (see *People v. Ross* (1985), 133 Ill. App. 3d 66, 73-74, 478 N.E.2d 575) and conclude, in accordance with *Payton*, that Officer Votava's warrantless entry into room 219 must be considered unreasonable unless exigent circumstances were present. Our conclusion is consistent with decisions in prior Illinois cases rejecting the argument that warrantless entries and searches may be upheld if the party who consented to the entry had apparent authority to do so but lacked actual authority. (See *People v. Miller*, (1968), 40 Ill. 2d 154, 157-58, 238 N.E.2d 407, 409; *People v. Bochniak* (1981), 93 Ill. App. 3d 575, 577, 417 N.E.2d 722, 724.) Nor would the good-faith exception to the exclusionary rule recently enacted by the Illinois General Assembly prevent suppression of the evidence in this case, as it was not seized pursuant to a warrant issued by a judge or pursuant to a warrantless search incident to an arrest for violation of a statute or ordinance which was subsequently invalidated. See Ill. Rev. Stat. 1987, ch. 38, pars. 114-12(b)(1), (b)(2)(i), (b)(2)(ii).

The State does claim that exigent circumstances existed, asserting that the mere presence of cocaine in room 219 created an emergency situation because of the potential danger to hotel employees, citing *People v. Meddows* (1981), 100 Ill. App. 3d 576, 427 N.E.2d 219, a case which is readily distinguishable from the case at bar. In *Meddows*, the court held that a warrantless search of a house trailer was proper when one of defendant's relatives informed police that there was dynamite inside the trailer. (*Meddows*, 100 Ill. App. 3d at 581, 427 N.E.2d at 222.) Defendant lived in the trailer with his wife and stepson, and the police had reason to believe several children were in the trailer at the time. The court stated that the purpose of the search was to prevent a potential disaster and held that the search was justified because it fell within the emergency exception to the warrant requirement. *Meddows*, 100 Ill. App. 3d at 581, 427 N.E.2d at 222.

In *Meddows*, the mere presence of dynamite in the house trailer posed an immediate danger of substantial harm to the persons inside the trailer and, potentially,

to others as well. The presence of cocaine in a suitcase in room 219 did not, by itself, pose an immediate danger to anyone. In *United States v. Costa* (D.D.C. 1973), 356 F. Supp. 606, the court rejected the argument that the mere presence of narcotics inside a hotel room is sufficient to justify a warrantless entry and search on the basis of exigent circumstances, stating, "Narcotics are dangerous but passive *per se*. They posed no *immediate* danger to the community or police." (*Costa*, 356 F. Supp. at 611.) In the case at bar, any potential danger to hotel employees could have been averted by locking the door to room 219 and preventing entry while a search warrant was sought. We do not agree that the warrantless entry and search can be justified on the basis that a potential emergency existed.

Finally, the State asserts that the cocaine seized from the suitcase in room 219 was admissible in evidence because defendant lost any expectation of privacy by telling Officer Votava to go ahead and look inside the suitcase and that it did not belong to defendant. (See *People v. Hanlon* (1985), 137 Ill. App. 3d 305, 314, 483 N.E.2d 1332, 1338.) Whether this statement is considered an abandonment of defendant's interest in the suitcase, as the State argues, or consent to the subsequent search, it must be determined whether the cocaine was the fruit of Officer Votava's illegal entry into the hotel room. Under the exclusionary rule, evidence obtained during or as a direct result of an unlawful entry is generally inadmissible. (*Wong Sun v. United States* (1963), 371 U.S. 471, 485, 9 L. Ed. 2d 441, 454, 83 S. Ct. 407, 416.) Evidence will not be considered "fruit of the poisonous tree" simply because it would not have been discovered but for the illegal actions of the police. (*Wong Sun*, 371 U.S. at 487-88, 9 L. Ed. 2d at 455, 83 S. Ct. at 417.) Instead, the determinative question is whether the evidence has been discovered by exploitation of that illegality or by means sufficiently distinguishable to be purged of the primary taint. 371 U.S. at 488, 9 L. Ed. 2d at 455, 83 S. Ct. at 417.

In *Brown v. Illinois* (1975), 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254, the United States Supreme Court set forth factors for determining whether inculpatory statements by a defendant following an arrest are sufficiently purged of the taint of the arrest to be admitted into evidence. These factors are (1) whether *Miranda* warnings were given, (2) the amount of time that elapsed between the arrest and the statements, (3) the presence of any intervening circumstances, and (4) the purpose and flagrancy of the police misconduct. (*Brown*, 422 U.S. 590, 603-04, 45 L. Ed. 2d 416, 427-28, 95 S. Ct. 2254, 2261-62.) Although *Brown* involved the admissibility of a confession following an illegal arrest, we consider the factors to be relevant in determining whether defendant's consent to the search or abandonment of the suitcase sufficiently attenuated the taint of the illegal entry. See *People v. Odom* (1980), 83 Ill. App. 3d 1022, 1028, 404 N.E.2d 997, 1002.

No *Miranda* warnings were given in the case at bar, nor was defendant advised that he did not have to consent to the search. The amount of time between the illegal entry and the discovery of the cocaine was very brief; Officer Votava found the cocaine within minutes of the illegal entry. There were no intervening circumstances between the illegal entry and the abandonment of the suitcase or consent to the search which would indicate that this was an intervening act of a free will sufficient to dissipate the taint of the illegal entry. (*Wong Sun v. United States* (1963), 371 U.S. 471, 486, 9 L. Ed. 2d 441, 454, 83 S. Ct. 407, 416-17.) Although the police misconduct was not flagrant, due to Officer Votava's belief that room 219 was vacant, the other factors suggest that defendant's consent to the search or abandonment of the suitcase did not purge the primary taint of the illegal entry. Compare *People v. Hanlon* (1985), 127 Ill. App. 3d 305, 313-14, 483 N.E.2d 1332.

We must also consider whether the inculpatory statements made by defendant should have been suppressed. Utilizing the *Brown* factors, we note first that defendant

did receive *Miranda* warnings before making the statements and that they were made within a relatively short period of time after the illegal entry. The first statements were made approximately 30 minutes after the entry; the next set of statements was made about four hours after the entry; and defendant's apology to Officer Votava for lying occurred within 24 hours of the entry. There were no intervening circumstances between the entry and the statements to indicate that they were sufficiently an act of free will to purge the primary taint of the illegal invasion. While we have noted that the police misconduct was not flagrant, the nature of that misconduct must be considered as well. (*People v. Robbins* (1977), 54 Ill. App. 3d 298, 305, 369 N.E.2d 577, 581.) Defendant made the inculpatory statements after Officer Votava found the cocaine in his hotel room. Confronting a suspect with illegally seized evidence under circumstances such as these tends to induce a confession by demonstrating that it is futile to remain silent. (*Robbins*, 54 Ill. App. 3d at 305, 369 N.E.2d at 581.) As in *Robbins*, it is most probable that defendant confessed only because he was caught redhanded. We conclude that defendant's confessions were not sufficiently an act of free will to purge the primary taint of the illegal entry. *Wong Sun v. United States* (1963), 371 U.S. 471, 486, 9 L. Ed. 2d 441, 454, 83 S. Ct. 407, 416-17; *People v. Koniecki* (1985), 135 Ill. App. 3d 394, 401-03, 481 N.E.2d 973.

Once the defendant establishes the causal connection between the primary illegality and the alleged fruits of the illegality, the State has the burden of demonstrating by clear and convincing evidence that the challenged evidence was obtained by means sufficiently distinguishable to be purged of the primary taint. (*People v. Robbins* (1977), 54 Ill. App. 3d 298, 305, 369 N.E.2d 577, 581.) The causal connection between Officer Votava's illegal entry and both the cocaine seized from the hotel room and defendant's inculpatory statements is clear, and the State failed to demonstrate that this evidence was obtained by means

sufficently distinguishable to be purged of the primary taint. We conclude that both the cocaine and the defendant's inculpatory statements should have been suppressed. Defendant's conviction must be reversed and the cause remanded to the circuit court for a new trial.

Reversed and remanded.

REINHARD and UNVERZAGT, JJ., concur.

(Letterhead of)

STATE OF ILLINOIS
APPELLATE COURT
SECOND DISTRICT

Appeal from the Circuit Court of County of DuPage

Trial Court Number: 86CF1036

THE COURT HAS THIS DAY, 10/14/88, ENTERED THE FOLLOWING ORDER IN THE CASE OF:
Gen. No.: 2-87-0015

People v. Vought, Bartlett

Petition for Rehearing by Plaintiff-Appellee is denied.
Nash, Reinhard, Unverzagt, JJJ.

LOREN J. STROTZ, CLERK

cc: G. Joseph Weller, Deputy Defender
Robert C. Cooper
Honorable James E. Ryan
William L. Browers, Deputy Director
Marshall M. Stevens

(Letterhead of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

February 1, 1989

State's Attorney DuPage County
207 Reber Street
Wheaton, IL 60187

No. 67932—People State of Illinois, petitioner, v. Bartlett Vought, respondent. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 23, 1989.

ORIGINAL

Supreme Court, U.S.
FILED
MAY 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

6 cc

NO. 88-1796

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

- VS -

BARTLETT VOUGHT, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
SECOND JUDICIAL DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

G. Joseph Weller, Deputy Defender
OFFICE OF THE STATE APPELLATE DEFENDER
100 East Chicago Street, Suite 801
Elgin, Illinois 60120
(312) 695-8822

COUNSEL FOR RESPONDENT

May 31, 1989

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review the Illinois Appellate Court's proper decision to suppress evidence found in a warrantless, non-exigent search by a police officer of respondent's hotel guest room.

2. Whether, even if federal constitution questions are considered, the Illinois Appellate Court properly rejected the state's "good-faith" argument where the police secured no warrant for respondent's hotel guest room and where no exigent circumstances existed.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	1
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING WRIT:	
I.	
THE ILLINOIS APPELLATE COURT PROPERLY REQUIRED THE SUPPRESSION OF EVIDENCE FOUND IN A WARRANTLESS, NON-EXIGENT SEARCH BY A POLICE OFFICER OF RESPONDENT'S HOTEL ROOM BASED ON YOUR HONORS' DECISION IN STONER V. CALIFORNIA, 376 U.S. 483 (1964)	1
II.	
EVEN IF FEDERAL CONSTITUTIONAL QUESTIONS ARE CONSIDERED, THE ILLINOIS APPELLATE COURT PROPERLY REJECTED THE STATE'S "GOOD FAITH" ARGUMENT WHERE THE POLICE SECURED NO WARRANT FOR RESPONDENT'S HOTEL GUEST ROOM AND WHERE NO EXIGENT CIRCUMSTANCES EXISTED	5

TABLE OF AUTHORITIES

Cases:	Page
Stoner v. California, 376 U.S. 483 (1964).....	1-4
Chapman v. United States, 365 U.S. 610 (1961).....	2
People v. Vought, 174 Ill.App.3d 563, 528 N.E.2d 1095 (2d Dist. 1988).....	2, 3
Katz v. United States, 389 U.S. 347 (1967).....	2
United States v. Matlock, 415 U.S. 164 (1974).....	2-3
Payton v. New York, 445 U.S. 573 (1980).....	3,4,5
State v. Carsey, 664 P.2d 1085 (Or. 1983).....	3
State v. No Heart, 353 N.W.2d 43 (S.D. 1984).....	4
People v. Miller, 40 Ill.2d 154, 238 N.E.2d 407 (1968) cert. denied, 393 U.S. 961.....	4
People v. Bochniak, 93 Ill.App.3d 575, 417 N.E.2d 722 (1st Dist. 1981).....	4
United States v. Leon, 468 U.S. 897 (1984).....	5
Illinois v. Krull, 480 U.S. 340 (1987).....	5
United States v. Jacobsen, 466 U.S. 109 (1984).....	5, 6
Other Authorities:	
1 W. LaFave, SEARCH and SEIZURE (1987).....	6
Ill.Rev.Stat. 1987, Ch. 38, pars. 114-12(b)(1), (b)(2)(i), (b)(2)(ii).....	5

NO. 88-1796

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

- VS -

BARTLETT VOUGHT, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The Opinion of the Appellate Court, Second Judicial District, is reported at 174 Ill.App.3d 563, 528 N.E.2d 1095 (2d Dist. 1988).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari (Petition at 1-2). However, as treated more fully in the argument portion of this Brief in Opposition, respondent does not believe that the petitioner has shown any compelling reason for this Court to grant the Writ of Certiorari.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner has quoted the provisions of the United States Constitution applicable to this case. (Petition at 2)

STATEMENT OF THE CASE

Petitioner's Statement of the Case adequately, presents the facts pertaining to the questions presented.

REASONS FOR DENYING THE WRIT

I.

THE ILLINOIS APPELLATE COURT PROPERLY REQUIRED THE SUPPRESSION OF EVIDENCE FOUND IN A WARRANTLESS, NON-EXIGENT SEARCH BY A POLICE OFFICER OF RESPONDENT'S HOTEL GUEST ROOM BASED ON YOUR HONORS' DECISION IN STONER v. CALIFORNIA, 376 U.S. 483 (1964).

A particularly telling omission in the State's Petition for Certiorari is the case relied on by the Illinois Appellate Court, Stoner v. California, 376 U.S. 483 (1964). In holding that the search was improper, the reviewing court below considered Stoner as

dispositive of the issue. People v. Vought, 174 Ill.App.3d 563, 528 N.E.2d 1095, 1098-1099 (2d Dist. 1988). In Stoner, Your Honors rejected the state's contention that the search of the petitioner's hotel room without a warrant was lawful because the hotel clerk consented to the search. Relying on the analogous situation in Chapman v. United States, 365 U.S. 610 (1961) (where it was held that a landlord generally may not give consent to the search of a dwelling rented to another), this Court held that hotel room guests are entitled to the constitutional protection against unreasonable searches and seizures, stating: "That protection would disappear if it were left to depend upon the unfettered discretion of an employee of a hotel." 376 U.S. at 490.

The first ground proffered by the State as reason for granting the writ in the cause at bar is that the hotel employee had "apparent authority" to consent to the search. This "apparent authority" contention was explicitly rejected in Stoner, to wit:

> ...Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of "apparent authority."... '[I]t is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from searches and seizures subtle distinctions, developed and refined by common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical.'.... [quoted from Jones v. United States, 362 U.S. 257, 266-267 (1960)]
>
> 376 U.S. at 488.

This eschewal of injecting property law rationale into the area of search and seizures was also a position taken by Your Honors in Chapman, 365 U.S. at 616-617. At issue are not property interests, but privacy interests. The Fourth Amendment protects people, not places. Katz v. United States, 389 U.S. 347, 351 (1967). The respondent had the right to the reasonable expectation of privacy in his hotel room.

As demonstrated above, the rule of Stoner is dispositive of the cause at bar. In advancing on its "apparent authority" contention, the petitioner relies primarily on United States v. Matlock, 415

U.S. 164 (1974).[1] A review of Matlock finds that this reliance is misplaced. The holding in Matlock provides that a valid third-party consent exists where "the consent of one who possesses common authority over premises or effects is valid against the absent, nonconsenting person with whom that authority is shared." 415 U.S. at 170. It is important to note that the third-party in Matlock was a co-habitant with the defendant.

Matlock is distinguishable. First, the cause at bar clearly falls under the ambit of Stoner since the defendant was a hotel guest. Second, a Matlock co-habitant is not involved in the matter at bar. There is no co-possessor here. Third, the respondent's reliance on footnote 7 of the Matlock opinion, 415 U.S. at 171, is unfounded since, in a hotel room situation, there is no "mutual use of the property ... for most purposes...." A hotel guest, as found by this Court in Stoner, has a reasonable expectation of privacy when no exigent circumstances exist.

One state supreme court has rejected Matlock's application in a non-"joint-user" situation, to wit:

> ... The Matlock exception is not a good faith exception to the warrant requirement; it is a consent exception resting upon the assumption that joint use or occupancy of the premises by the consenting party creates a species of assumption of risk by the defendant that the co-tenant might permit the common area to be search .... [U]pholding searches such as this based upon subjective good faith of the searching officers, might encourage police to obtain as little pre-search information as possible concerning defendant's relationship to the defendant and to their common use, access, or control of the premises to be searched.
>
> State v. Carsey, 664 P.2d 1085, 1094 (Or. 1983) (emphasis in original)

Further, it is significant that, for purposes of this petition, the petitioner has forsaken its exigent circumstances argument made below. Payton v. New York, 445 U.S. 573 (1980). See, e.g., Vought, 528 N.E.2d at 1099. Thus, there is nothing from the record to suggest that Stoner should not be applicable to the cause at bar.

---

[1] Parenthetically, reliance on Matlock is made for the first time with this Court -- no mention of Matlock was made below, either in the respondent's appellate brief, petition for rehearing or in its petition for leave to appeal to the state supreme court.

Lastly, the petitioner seeks to suggest in its footnote, petition at 6, that there is a conflict among the jurisdictions on this issue. That contention is without merit. All of the cases cited in that footnote, save one, deal directly with an "apparent authority" figure, more commonly referred to as "common authority" or "joint user", in a non-hotel guest situation. None of those cases take this instant cause from the ambit of the Stoner rule.

The single hotel case cited by the petitioner, State v. No Heart, 353 N.W.2d 43 (S.D. 1984), is distinguishable. In No Heart, the hotel manager called the police to investigate a hotel room which was supposed to be vacant. The hotel manager authorized the police to check and enter the supposedly unoccupied room. 353 N.W.2d at 45. Here, the facts are markedly different -- defendant had registered for this hotel room, room 219, and had a "Do Not Disturb" sign affixed to the outside of his door. (C. 75, 83) While it is true that at the time of the search, the hotel checkout time had past, defendant's expectation of privacy was nonetheless not vitiated by this less than two hour passage of time. (C. 91, 94)

Further, the petitioner's "apparent authority" contention has been rejected in Illinois, by the Supreme Court of Illinois in People v. Miller, 40 Ill.2d 154, 238 N.E.2d 407, 409 (1968), cert. denied, 393 U.S. 961 and by the Appellate Court in People v. Bochniak, 93 Ill.App.3d 575, 417 N.E.2d 722, 724 (1st Dist. 1981).

In sum, because the Illinois Appellate Court properly found Stoner and Payton controlling, there is no compelling reason for this Court to review the cause at bar.

II.

EVEN IF FEDERAL CONSTITUTIONAL QUESTIONS ARE CONSIDERED, THE ILLINOIS APPELLATE COURT PROPERLY REJECTED THE STATE'S "GOOD-FAITH" ARGUMENT WHERE THE POLICE SECURED NO WARRANT FOR RESPONDENT'S HOTEL GUEST ROOM AND WHERE NO EXIGENT CIRCUMSTANCES EXISTED.

As a preliminary matter it should be noted that petitioner's good-faith component in this warrantless, non-exigent search is without support. United States v. Leon, 468 U.S. 897 (1984), is readily distinguishable because Leon dealt with a defective warrant; the police in Illinois v. Krull, 480 U.S. 340 (1987), relied on a constitutionally-infirm statute allowing warrantless administrative searches. Thus, in both cases, the police had "good-faith" in a judicially-issued warrant or in a legislative enactment (doing away with a warrant requirement). No such "good-faith" can be found here. Here, as reflected in the petitioner's statement of the case, Petition at 3-4, the police at bar can posit no such mitigating circumstance. The police had no "good-faith" in this warrantless search where the circumstances allowed for, and required, the judicial role. Payton v. New York, 445 U.S. 573 (1980). In addition, as noted by the appellate court below, this purported "good-faith" evinced by the police does not fall into the exclusionary exception recently enacted by the state legislature. See, Ill.Rev. Stat. 1987, Ch. 38, pars. 114-12(b)(1), (b)(2)(i), (b)(2)(ii). 528 N.E.2d at 1100. In short, the petitioner posits no theory to excuse the warrant requirement.

Moreover, the petitioner's reliance on this Court's decision in United States v. Jacobsen, 466 U.S. 109 (1984), is seriously misplaced. The petitioner suggests that there was no constitutional violation because the search of the respondent's room was a private search. The reviewing court below rejected the petitioner's contention, 528 N.E.2d at 1098-1099, distinguishing Jacobsen on the grounds that in the case at bar, unlike in Jacobsen, the contraband was seized from the defendant. In a footnote in Jacobsen, Your Honors stated that a search would be unconstitutional where the police learn from a private individual that there is contraband inside a container, seize the container from its owner, and then

conduct a warrantless search. 466 U.S. at 120 n.17. The scenario described therein is found in the cause at bar.

Further, the petitioner ignores that the police here made a warrantless entry, (C. 95, 110), to the respondent's Fourth Amendment - protected hotel room. Indeed, the appellate court also noted a quote from Professor LaFave's treatise that meets the situation at bar, to wit:

> ... it is to be doubted that if a private person searched the premises of another and then reported it to the police what he found (instead of removing the evidence and handing it over to the police), that the police could then make a warrantless entry of those premises and seize the named evidence.
>
> 1 W. L.Fave, SEARCH and SEIZURE, § 1.8(b), at 188 (1987).

In sum, for the reasons stated above, the Illinois Appellate Court correctly found Jacobsen inapposite to the cause at bar. Instead, the court below properly followed the Stoner rule rather than the Jacobsen guidelines; therefore, the State's petition on this ground is without merit.

CONCLUSION

For the aforegoing reasons, respondent prays that this Honorable Court deny the state's Petition for Writ of Certiorari.

Respectfully submitted,

G. Joseph Weller, Deputy Defender
OFFICE OF THE STATE APPELLATE DEFENDER
100 East Chicago Street, Suite 801
Elgin, Illinois 60120
(312) 695-8822

Counsel for Petitioner

Manuel S. Serritos, Assistant Defender
OFFICE OF THE STATE APPELLATE DEFENDER
100 East Chicago Street, Suite 801
Elgin, Illinois 60120
(312) 695-8822

OF COUNSEL

NO. 88-1796

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

- VS -

BARTLETT VOUGHT, RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Bartlett Vought, asks leave to file the attached Respondent's Brief In Opposition to the Supreme Court of the State of Illinois, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Respondent was previously granted leave to proceed in Forma Pauperis in this cause in the Illinois Appellate Court.

The petitioner's affidavit in support of this motion is attached hereto.

G. Joseph Weller, Deputy Defender
OFFICE OF THE STATE APPELLATE DEFENDER
100 East Chicago Street, Suite 601
Elgin, Illinois 60120
(312) 695-8822

Counsel for Petitioner

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

- VS -

BARTLETT VOUGHT, RESPONDENT

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Bartlett Vought, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on my petition for writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of the proceeding are true.

1. Are you presently employed?

No. I am presently incarcerated without employment.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?

No. Only limited expense money from several friends for cigarettes, coffee, etc.

3. Do you own any cash or checking or savings account?

I Have no cash or bank accounts at this time.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

I Have absolutly no personal property or interest bearing accounts.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I only Have a son who is 21 years old and he is self-Supporting. I Have no Dependents.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury

Bartlett Vought

Bartlett Vought

SUBSCRIBED and SWORN to before me this 21 day of October, 1989.

Notary Public

NO. 88-1796

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

- VS -

BARTLETT VOUGHT, RESPONDENT

CERTIFICATE OF SERVICE

I, G. Joseph Weller, a member of the bar of this Court and representing Respondent in this cause, certify:

1) That I have served copies of the Motion for Leave to Proceed in Forma Pauperis, the Affidavit in support thereof, and the Respondent's Brief in Opposition on each of the counsel for petitioner, by depositing same in a United States Post Office mail box in Elgin, Illinois 60120, with first class postage prepaid, and with the envelope addressed as follows:

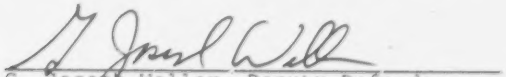
Honorable Neil F. Hartigan
Attorney General of Illinois
100 West Randolph Street - 12th Floor
Chicago, Illinois 60601

Hon. James E. Ryan, State's Attorney
DuPage County, 207 Reber Street
Wheaton, Illinois 60187

Willian L. Browers, Deputy Director
State's Attorneys Appellate Prosecutor
35 Fountain Square Plaza
Elgin, Illinois 60120

2) The above parties are the only parties required to be served.

3) An appearance form for the undersigned is attached hereto.



G. Joseph Weller, Deputy Defender
OFFICE OF THE STATE APPELLATE DEFENDER
100 East Chicago Street, Suite 801
Elgin, Illinois 60120
(312) 695-8822

Counsel for Respondent

DATED: May 31, 1989

NO. 88-1799

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PEOPLE OF THE STATE OF ILLINOIS, PETITIONER

- VS -

BARTLETT VOUGHT, RESPONDENT

AFFIDAVIT OF FILING BY MAIL

STATE OF ILLINOIS)
) SS
COUNTY OF KANE)

The undersigned, being first duly sworn on oath, deposes and says that he mailed the required number of copies of the Motion for Leave to Proceed In Forma Pauperis and of the Respondent's Brief In Opposition to the Supreme Court, in the above entitled cause, to the Clerk of the above Court, the Attorney General of Illinois, the State's Attorney of DuPage County, and the Deputy Director, State's Attorneys Appellate Service Commission, by depositing them in the United States Mail in Elgin, Illinois, with first class postage prepaid, and properly addressed to the Clerk of this Court on May 31, 1989, within the time for filing a Brief in Opposition to a Petition for a Writ of Certiorari.

G. Joseph Weller

G. Joseph Weller, Deputy Defender

SUBSCRIBED and SWORN to before me
this 31st day of May, 1989.

Joni S. Giertz

Notary Public

OFFICIAL SEAL
JONI S. GIERTZ
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 10-21-91

OFFICE OF THE STATE APPELLATE DEFENDER
SECOND JUDICIAL DISTRICT

100 EAST CHICAGO STREET · SUITE 700
ELGIN, ILLINOIS 60120-5592
TELEPHONE (312) 695-8822

G. JOSEPH WELLER
DEPUTY DEFENDER

PATRICK M. CARMODY
KIM M. DE WITT
PAUL J. GLASER
KATHLEEN J. HAMILL
FRANCINE HARRISON
BETH KATZ
THOMAS A. LILIEN
BARBARA R. PASCHEN
MANUEL S. SERRITOS
ROGER WARNER
STEVEN E. WILTGEN
ASSISTANT DEFENDERS

MARY GRUDNOWSKI
INVESTIGATOR

RECEIVED
JUN - 5 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

May 31, 1989

Honorable Joseph Spaniol
Clerk of the United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

RE: Illinois v. Vought, no. 88-1796

Dear Mr. Spaniol:

Enclosed please find the Brief In Opposition and an affidavit of mailing for the Motion to Proceed in Forma Pauperis with this Court under separate cover. Since the Brief In Opposition is filed under the in forma pauperis rules; the customary orange cover for this pleading has not been used.

If I can provide any further assistance in this matter, please do not hestitate to let me know. Thank you in advance for your attention in this matter.

Sincerely,

Manuel S. Serritos

Manuel S. Serritos
Assistant Defender

MSS/sls
Enclosure

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 88-1796

People of the State of Illinois (Petitioner ~~or Appellant~~) vs. BARTLETT VOUGHT, (Respondent ~~or Appellee~~)

The Clerk will enter my appearance as Counsel of Record for Bartlett Vought

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature G. Joseph Weller

(Type or print) Name G. Joseph Weller, Deputy Defender

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm OFFICE OF THE STATE APPELLATE DEFENDER

Address 100 East Chicago Street, Suite 801

City & State Elgin, Illinois Zip 60120

Phone (312) 695-8822

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A